

THE STATES OF DELAWARE, MAINE, NEW JERSEY, AND RHODE ISLAND, AND THE CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION, THE CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY, THE MARYLAND DEPARTMENT OF THE ENVIRONMENT, THE MARYLAND PUBLIC SERVICE COMMISSION, THE RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, THE VERMONT PUBLIC UTILITIES COMMISSION, AND THE VERMONT DEPARTMENT OF ENVIRONMENTAL CONSERVATION

November 23, 2020

By CM/ECF Filing

The Honorable Mary F. Walrath  
United States Bankruptcy Court for the District of Delaware  
824 North Market Street  
5th Floor, Courtroom #4  
Wilmington, DE 19801

Re: In Re: NorthEast Gas Generation, LLC et. al., Case No. 20-11597 (MFW).  
Statement of Support of Memorandum of Law of New York and  
Massachusetts

Dear Judge Walrath:

The States of Delaware, Maine, New Jersey, and Rhode Island, by and through their Attorneys General, and the Connecticut Department of Energy and Environmental Protection, the Connecticut Public Utilities Regulatory Authority, the Maryland Department of the Environment, the Maryland Public Service Commission, the Maine Department of Environmental Protection, the Rhode Island Department of Environmental Management, the Vermont Public Utilities Commission, and the Vermont Department of Environmental Conservation,

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(collectively the “States”), submit this letter<sup>1</sup> in support of the Memorandum of Law filed on November 20, 2020 by the State of New York and the Commonwealth of Massachusetts [D.I. 289] (the “NY-MA Memorandum of Law”). As detailed in the NY-MA Memorandum of Law, as well as set forth briefly below, the Debtors’ Joint Plan of Reorganization [D.I. 230] would undermine the policy and law of the States, as well as that of New York and Massachusetts. The States urge the Court to deny approval of the Debtors’ Joint Plan of Reorganization, or any plan of reorganization, that seeks to undermine the environmental enforcement power of the States (*see* D.I. 224 at 9-10; D.I. 225 at 4-5; D.I. 289 at 16-29) or detrimentally affect the environmental and energy policies duly adopted in the statutes and regulations of the States. The Debtors should not be permitted through bankruptcy to so undermine state law and policy.

The Regional Greenhouse Gas Initiative (“RGGI”) is the nation’s first market-based program to reduce greenhouse gas emissions. The RGGI

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<sup>1</sup> As discussed below, and explained in the NY-MA Memorandum of Law (*see* D.I. 289 at 6-8, 12-13), the Debtors’ Joint Plan of Reorganization would have detrimental impacts not only on New York and Massachusetts, where the Debtors’ RGGI regulated facilities are located, but on all of the RGGI states. Despite this, the impact of the Debtors’ Joint Plan of Reorganization was not disclosed by the Debtors to the States. While the States have thus not had the opportunity to fully examine and address the issue in the depth that New York and Massachusetts have, the States want to alert the Court to their concerns and highlight for the Court that issues raised in the NY-MA Memorandum of Law are applicable throughout the RGGI participating states.

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participating states (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont<sup>2</sup>) have each adopted mandatory environmental obligations to cap and reduce power sector carbon dioxide (“CO<sub>2</sub>”) emissions. Each state has adopted through their state’s statutes and regulations, based on the RGGI Model Rule, a CO<sub>2</sub> Budget Trading Program that limits emissions of CO<sub>2</sub> from affected electric power plants, issues CO<sub>2</sub> allowances, and establishes participation in regional CO<sub>2</sub> allowance auctions. *See, e.g.*, Conn. Gen. Stat. § 22a-200c; 7 *Del. C.* § 6043-47; 38 ME. STAT tit. 38, § 580-B; MD. CODE ANN., ENVIR. §§ 1-101, 1-404, 2-103, 2-1002(g); N.J. S.A. 26:2C-45 through 57; R.I.G.L. Chapter 23-82; Conn. Agencies Regs. § 22a-174-31; 7 Del. Admin. C. § 1147; 06-096 CODE ME. R. ch. 156, 158; Md. Code Regs. 26.09.01–.04; N.J.A.C. 7:27C; 250-RICR-120-05-46, 47.

Within the RGGI states, fossil-fuel-fired electric power generators with a capacity of 25 megawatts (MW) or greater are required to hold allowances equal to their CO<sub>2</sub> emissions over a three-year control period. *See, e.g.*, Conn. Agencies Regs. § 22a-174-31; 7 Del. Admin. C. § 1147-1.2.1, 1.3, 1.5.3; 06-096 CODE ME. R. ch. 156 §§ 1(B)(37 & 53), 5; MD. CODE REGS. 26.09.01.02, 26.09.02.03; N.J.A.C. 7:27C-1.2, -1.4; 250-RICR-120-05-46.6, 46.7, 46.8. A CO<sub>2</sub> allowance

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<sup>2</sup> Virginia is expected to begin participation in the regional program in January 2021.

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represents a limited authorization to emit one short ton of CO<sub>2</sub> from a regulated source, as issued by a participating state. Regulated power plants can use CO<sub>2</sub> allowances issued by any participating state to demonstrate compliance in any participating state, and may acquire allowances by purchasing them at regional auctions or through secondary markets.

For the current three-year control period, each regulated power plant must hold allowances equal to its emissions through December 31, 2020, on March 2, 2021. A power plant that does not hold sufficient CO<sub>2</sub> allowances to cover its emissions—as the Debtors are proposing—will be required to surrender CO<sub>2</sub> allowances equal to three times the number (tons) of the source’s emissions in excess of its holdings, and the failure to do so is a violation of law in the applicable RGGI state and may result in state-specific penalties. *See, e.g.*, Conn. Agencies Regs. § 22a-174-31; 7 Del. Admin. C. § 1147-6.5.4; 06-096 CODE ME. R. ch. 156 § 5; 06-096 CODE ME. R. ch. 156 § 5; N.J.A.C. 7:27C-6.9(e)-(g); 250-RICR-120-05-46.12.5(D). Each RGGI state has its own regulations governing compliance determinations and enforcement.

RGGI has demonstrated that a regional market-based approach to reducing CO<sub>2</sub> pollution can be successful in controlling emissions while also creating jobs

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and generating positive economic benefits for consumers.<sup>3</sup> The Debtors' Plan, however, seeks to discharge the RGGI compliance obligation. Permitting this aspect of the Debtors' Plan would allow the Debtors to violate state law controlling CO<sub>2</sub> pollution and undermine state environmental policy. If the Court were to approve the objected to aspects of the Debtors' Plan, that decision could have significant consequences both in this case and more broadly, in the event that other regulated entities attempt to use bankruptcy to avoid their RGGI compliance obligations (and potentially obligations under other allowance-based programs). Allowing the Debtors – or other RGGI regulated entities – to avoid their RGGI allowance obligations through bankruptcy:

- will result in a proportionally larger amount of CO<sub>2</sub> allowances in the market for use by other regulated entities, thereby undermining the integrity of the RGGI market;
- will allow CO<sub>2</sub> emissions within the regional market in avoidance of market controls, thereby effectively increasing the regional emissions

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<sup>3</sup> In *Stevenson v. DNREC*, the Delaware Superior Court considered expert evidence and discussed in detail Delaware's implementation of the RGGI program. *See, e.g., Stevenson v. DNREC*, 2018 WL 3134849, at \*1-5, 7-11 (Del. Super. June 26, 2018), *aff'd* 205 A.3d 821, 2019 WL 654595 (Del. 2019). The Court dismissed the challenge to the program, finding that plaintiffs could not show any financial harm from the program. *Id.* at \*16.

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cap above the levels established by the participating states in violation of state law and undermining state policy;

- will reduce the States' ability to invest in greenhouse gas mitigation efforts, both because of the inability to retire the specific allowances avoided and the depressive effect of effectively inflating the number of allowances available to other regulated power plants, thereby negatively impacting beneficial consumer programs; and
- most importantly, would purport to permit the violation of state law and the operation of facilities in violation of their required operating permit. *See, e.g.*, Conn. Agencies Regs. § 22a-174-31; 7 Del. Admin. C. § 1147-1.5.1; 06-096 CODE ME. R. ch. 156; MD. CODE REGS. 26.09.02.04; N.J.A.C. 7:27C-1.4, -3.1; 250-RICR-120-05-46.10, 46.18.

Accordingly, the States respectfully urge the Court to adopt the positions advocated by New York and Massachusetts, including to find that the States' police and regulatory powers are neither claims nor dischargeable in this bankruptcy proceeding, and to deny approval of any plan of reorganization that includes the aspects opposed by New York and Massachusetts.

Respectfully submitted,

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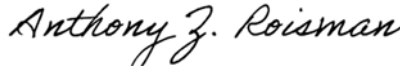
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